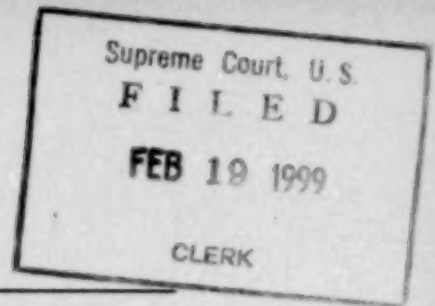


(1)



NO. 97-1992

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

VAUGHN L. MURPHY, Petitioner

v.

UNITED PARCEL SERVICE, INC., Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE*
AMERICAN DIABETES ASSOCIATION
IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PETITIONER¹

¹ Pursuant to Rule 37.6, only counsel for *Amicus* American Diabetes Association authored this brief. Only *Amicus* made monetary contribution to the preparation and submission of this brief.

INTRODUCTORY STATEMENT

Whatever definition of "impairment" and "disability" the Court uses in this case will directly and significantly affect the legal rights and remedies of over 16,000,000 Americans with diabetes. This case will determine whether the Americans With Disabilities Act ("ADA") has the broad, remedial purpose intended by Congress and needed by all Americans with disabilities.

For Americans with disabilities, there are certain critical criteria for creating and applying a definition of an "impairment" which qualifies as a "disability" to be protected by the ADA. In understanding such criteria, it is helpful to consider, as Shakespeare so provocatively stated:

What's in a name? That which we
call a rose by any other name would
smell as sweet.²

Or, as the more pithy Gertrude Stein declared:
Rose is a Rose is a Rose is a Rose.³

² Shakespeare, William, *Romeo & Juliet*, Act II, Scene 2, Line 43 (1595).

³ Stein, Gertrude, *Sacred Emily*, The Oxford Book of American Light Verse, Oxford University Press, (1979) p. 286.

For this case, the question asked by millions of Americans living with disabilities is: When is a disability a "disability"? This question focuses on 42 U.S.C. § 12102(2)(A) or so-called "prong one" of the definition of "disability" under the ADA. At issue in this case is whether a disease should be evaluated as a "disability" in its treated or untreated condition.

INTEREST OF AMICUS CURIAE

How this Court handles hypertension in this case will directly influence how other courts handle diabetes regarding eligibility to be a qualifying "disability" under the ADA. Diabetes, like hypertension, is a chronic, non-curable disease for which the risks and complications of treatment are as potentially disabling as the risks and complications of the disease.⁴

The American Diabetes Association ("Association") is the nation's largest, oldest, most prominent, non-profit, voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all

⁴ Appendix to Petition for a Writ of Certiorari ("Pet.App."), pp. 13a & 16a.

people affected by diabetes.

The Association is made up of over 375,000 general members, over 16,000 health professional members, and over 3,000,000 contributors. The Association creates and maintains the most authoritative and widely-followed clinical practice recommendations, guidelines and standards for the treatment of diabetes.⁵ The Association is responsible for the most authoritative and comprehensive publications concerning the treatment of diabetes and developments in diabetes research.⁶

Among the Association's principal concerns is the fair treatment of individuals with diabetes in employment situations. The Association advocates the following policy:

Diabetes as such should not be a cause of

5 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care* 22:S32 (1999).

6 The Association publishes five professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *Diabetes Reviews* (invited reviews on selected topics for research-oriented health professionals); and, (5) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

discriminating against any person in employment. People with diabetes should be individually considered for employment, weighing such factors as the requirement or hazards of the specific job, and the individual's medical condition and treatment regimen (diet, oral hypoglycemic agents and insulin). Any person with diabetes, whether insulin-dependent or non-insulin-dependent, should be eligible for any employment for which he or she is otherwise qualified.⁷

Consistent with this policy, the Association has participated as *amicus curiae* in cases in the U. S. Supreme Court, many Circuit Courts of Appeal and a number of District Courts.

Presently, there are over 16,000,000 Americans with diabetes, including about 4,000,000 individuals who take insulin to treat their diabetes.⁸ Americans with diabetes, whether or not they take insulin, face serious health risks and complications including heart disease, stroke,

7 American Diabetes Association Employment Policy Statement (1984).

8 *Diabetes in America* (2d Ed.), National Institutes of Health (NIH Publication No. 95-1468) (1995), "Summary," Ch. 1, pg. 1.

blindness, kidney disease, nerve disease, amputation and difficult to control infection.⁹ The life-long medical and economic burden for individuals with diabetes is progressive, permanent and enormous. Diabetes is a serious, widespread and expensive national health problem.¹⁰

The Association knows through long experience that employers commonly restrict employment opportunities for individuals with diabetes and, in particular, for those who take insulin to treat their diabetes. Such restrictions are based on prejudices, stereotypes, unfounded fears and misinformation concerning diabetes and insulin in the workplace.¹¹ The Association is an advocate for employees and a resource of information for employers to understand that individuals with diabetes, whether or not they take insulin,

9 American Diabetes Association Position Statement: Standards of Medical Care for Patients with Diabetes Mellitus, *Diabetes Care* 22:S32 (1999).

10 In 1979, \$77.7 billion, i.e., 8% of all expenditures for health services in U.S., or \$10,071 per capita, compared with \$2,669 for individuals without diabetes. *Economic Consequences of Diabetes Mellitus in the U.S. in 1997*, American Diabetes Association (1998) pp. 9-12.

11 American Diabetes Association Position Statement: Hypoglycemia and Employment/Licensure, *Diabetes Care* 22:S103 (1999).

can be qualified, productive and safe workers in a wide range of employment situations for a broad spectrum of jobs. Indeed, employees with diabetes are often superior workers because of their appreciation, awareness and concern about safety in the workplace.

It is from this context that this *amicus* urges the Court in this case to create and apply a definition for "impairment" which is consistent with the broad, remedial purpose of the ADA. Americans living with disabilities are entitled to full and complete employment opportunities and to receive every reasonable opportunity to be productive, contributing and participating citizens. The definition of "impairment" fashioned in this case will have a significant impact on the 16,000,000 Americans with diabetes represented by the Association.

Additionally, this case involves an "impairment" (i.e. hypertension) which is similar to diabetes. Both diseases are not curable and are treated with medications which cause new and different medical problems. For both diseases treatment focuses on the symptoms of the underlying diseases which are physiological and metabolic in nature. The definition of "impairment" used in this case for hypertension will be used by other courts to determine if diabetes is a

qualifying "disability" under the ADA.

BACKGROUND ABOUT DIABETES¹²

Diabetes treated with insulin is similar to the hypertension afflicting Vaughn Murphy in this case. A brief, basic primer about diabetes as a non-curable, progressive disease will help frame the factual considerations necessary for an appropriate definition of "impairment" under the ADA.

Diabetes is a chronic disease involving the uncontrolled fluctuation of an individual's blood sugar level. Diabetes is physiologically caused by either the failure of the beta cells of the pancreas to produce enough insulin for normal carbohydrate, protein and fat metabolism or the failure of the body to effectively utilize the insulin that is produced.

Insulin is **not** a cure for diabetes but rather only a tool to help regulate an individual's blood sugar level. Insulin is a hormone that serves to transport sugar from the bloodstream into the

¹² See generally: *Bombrys v. City of Toledo*, 849 F.Supp 1210, 1213-1214 (N.D. Ohio 1993) and Bayler, *Dulling A Needle: Analyzing Federal Employment Restrictions on People With Insulin-Dependent Diabetes*, 67 Ind. L.J. 1067, 1068-1074 (1992).

cells of the body where it is metabolized. Without insulin the sugar stays in the bloodstream where the kidneys attempt to eliminate it through increased urine production. If this increased urine production is not slowed by insulin, an individual with diabetes will suffer many disabling symptoms. However, too much insulin causes too much sugar to cross the cell membranes resulting in abnormally low blood sugar levels from which an individual will suffer many new and different disabling symptoms.

Untreated diabetes will cause high blood sugar (hyperglycemia) whereas diabetes treated with too much insulin will result in low blood sugar (hypoglycemia). The goal of treatment is to try to balance the blood sugar level within a safe range, *i.e.* neither too low (to avoid hypoglycemia) nor too high (to avoid hyperglycemia). Regardless, the blood sugar levels for individuals with diabetes rise and fall day by day, and often hour by hour, as a result of a variety of external circumstances including the use and amount of insulin, use of oral medications, diet, exercise, stress, illness and infection.¹³

Whether treated or untreated individuals

¹³ *Medical Management of Type 1 Diabetes* (3d Ed.), American Diabetes Association (1998), pg. 51 *et. seq.*

with diabetes suffer many serious, progressive health complications which substantially limit many of life's major activities. There is a "high misery index" for an individual with diabetes: that individual has a 15 year shorter life expectancy than someone without diabetes;¹⁴ that individual is 2 to 4 times more likely to get heart disease, 2.5 times more likely to have a stroke, 4 times more likely to become blind, and 20 times more likely to get end-stage renal disease (kidney failure). An individual with diabetes is at a substantial higher risk for difficult to control infections and diabetes is the leading cause of adult blindness and non-traumatic amputations.

For an individual with diabetes who uses insulin (approximately 4,000,000 Americans) failure to take insulin can result in severe, acute medical problems and death in the short term.¹⁵ Insulin is used to help treat the symptoms of diabetes and try to lessen the acute and chronic complications from diabetes. However, the use of insulin creates other medical risks and problems

14 *Diabetes in America, supra*, "Mortality in Insulin-Dependent Diabetes," Ch.10, pp.221, 224-228 & "Summary", Ch.1, pg.4.

15 American Diabetes Association Position Statement: Insulin Administration, *Diabetes Care* 22:S83 (1999); Medical Management of Type 1 Diabetes, *supra*, pp. 51 & 55.

(i.e. hypoglycemia or insulin reaction) that lead to new and different limitations on many of life's major activities. Low blood sugar (hypoglycemia) leads to a variety of problems and symptoms ranging from tremors, palpitations and sweating through confusion, drowsiness, and mood changes to unresponsiveness, unconsciousness or convulsions.¹⁶

While elevated blood sugar level is of some concern because of long-term side-effects, the real danger is low blood sugar level caused by too much insulin. Hazardous side-effects associated with low blood sugar levels occur more quickly, more frequently and with more suddenness than do the effects of high blood sugar levels.¹⁷

As with many diseases which are disabling, treatment of diabetes with insulin has medical risks that can be more acute and more dangerous than the underlying disease. Diabetes treated with insulin has higher acute health risks while diabetes without insulin has higher chronic health risks, but both have many of the same health risks. Diabetes, whether treated or untreated, is an "impairment" which substantially limits many

16 *Medical Management of Type 1 Diabetes, supra*, pp. 134-138.

17 *Ibid.*

different major life activities.

The dilemma of a treatment which creates new and different health risks and problems is not unique to diabetes. Vaughn Murphy's treatment of his hypertension with medication creates new and different medical problems than those caused by his hypertension alone. The cruel predicament for many diseases which are treated with medication (*e.g.* hypertension and diabetes) is that the treatment, although potentially life-saving, can be more disabling than the untreated disease.

SUMMARY OF ARGUMENT

The Association urges this Court to fashion a definition of "impairment" which fulfills the broad, remedial purpose of the ADA. There are certain guiding criteria which are essential to creating and applying such a definition.

These criteria lead to a definition like that used in *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) and in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998). A definition which is inclusive not exclusive, focuses on the disease not its treatment and encourages not discourages treatment. Such a definition must look at a disease in its natural, untreated condition.

ARGUMENT

AN "IMPAIRMENT" MUST BE LOOKED AT IN ITS NATURAL, UNTREATED CONDITION TO DETERMINE WHETHER IT QUALIFIES AS A "DISABILITY" UNDER THE ADA.

To receive the protections of the ADA, an individual must have an "impairment" which qualifies as a "disability." The threshold or entry issue is whether an individual has a qualifying "disability". The ADA is structured so that once an individual has a qualified "impairment" then there are other considerations such as whether that individual is "otherwise qualified" or needs to be "reasonably accommodated" in order to perform a particular job. An individual's ability to function with a disability should not and need not be addressed in the definition of "impairment" but, rather, how that "impairment" will permit or limit an individual to perform in the workplace.

The focus of the Tenth Circuit in this case on the effects of treatment in order to determine whether a disease qualifies as an "impairment" is misplaced, unnecessary and contrary to the remedial purpose of the ADA. Rather, in answering this threshold question this Court

should look at only the natural, untreated condition of the disease.

Both the First Circuit in *Arnold v. United Parcel Service, supra*, and the Ninth Circuit in *Kirkingburg v. Albertson's, Inc., supra*, look at the disease and not at the treatment to evaluate whether that disease qualifies as an "impairment" under the ADA. This approach is consistent with the clear congressional intent behind the ADA, the actual language of the ADA and the interpretation and application of the ADA by this Court in *Bragdon v. Abbott*, 524 U.S. ____, 118 S.Ct., 2196, 141 L.Ed.2d 540 (1998).

The focal point of this case is on the qualifying definition of "impairment" under a "prong one" definition of a disability. 42 U.S.C. § 12101(2)(A). This argument focuses only on a "prong one" analysis: When does an individual with a chronic, permanent, non-curable disease have an "impairment" that qualifies as a "disability" under the ADA?

A. THE DEFINITION OF "IMPAIRMENT" MUST BE INCLUSIVE TO FULFILL THE BROAD REMEDIAL PURPOSE OF THE ADA.

The narrow and restrictive definition of

"impairment" used by the court below (*i.e.* requiring that a disease be evaluated in its treated condition) creates an artificial choke point at the beginning of the ADA analysis. This means that many of the millions of Americans living with disabilities cannot qualify for ADA protection since the vast majority of those Americans treat their disability. Under this narrow and restrictive approach treatment defines "impairment" and determines legal protection.

The actual language of the ADA and its legislative history make it clear that the ADA was intended to have a broad, remedial purpose. Specifically, its Findings and Purpose show that Congress intended the ADA to impact the lives of more than 43,000,000 Americans to address "a serious and pervasive social problem" which "persists" for which they "often had no legal recourse" thereby making people with disabilities "severely disadvantaged." 42 U.S.C. § 12101(a) (1), (2), (3), (4) & (6). The most powerful Congressional statement about the broad remedial purpose of the ADA is as follows:

Individuals with disabilities are a discreet and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of

political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. 42 U.S.C. § 12101(a)(7).

Congress states that America's goals regarding individuals with disabilities are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Finally, Congressional intent is unambiguous that the ADA was to have a broad remedial scope. The stated purpose of the ADA is

. . . to provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1).

It is "a familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 US 332, 336 (1967); *Arnold v. United Parcel Service, Inc.*, *supra*, 861. Given the clear, broad remedial purpose of the ADA, the Tenth Circuit's restrictive and narrow

definition of a qualifying "impairment" is contrary to that purpose.

To fulfill its broad remedial purpose the ADA is structured like a funnel with a broad open entrance to attract a wide variety of disabilities which can then be individually examined to see if they are eligible for ADA protection. The ADA analysis continually narrows as an individual with a particular "impairment" is evaluated for a specific job. The remedial purpose of the ADA is dramatically undermined if the qualifying definition for "impairment" is artificially narrowed.

B. THE DEFINITION OF "IMPAIRMENT" MUST FOCUS ON THE DISEASE AND NOT ON THE TREATMENT OF THAT DISEASE.

For purposes of deciding whether a particular disease qualifies as a "disability" under the ADA, it should not matter how or when that disease is treated. Rather, the impact and effectiveness of treatment for a disease should be examined in deciding whether that individual is "otherwise qualified" and needs "reasonable accommodation" to perform a particular job. In this context, the focus on the effect of treatment is not only appropriate, but necessary.

Congressional intent, the language of the ADA, the opinion of this Court and the interpretation of the EEOC support a definition of "impairment" that looks at a disease in its natural, untreated condition.

Again, Congressional intent is clear that "despite some improvements" "individuals with disabilities" "based on characteristics that are beyond the control of such individuals" need the broad remedial purpose of the ADA to eliminate discrimination. 42 U.S.C. § 12101(a) (2) & (7). These statements show that Congress anticipated that Americans living with disabilities would be evaluated by looking at the natural, untreated condition of that disability.

This Congressional intent is further supported by looking at various statements during the discussions and debates surrounding the passage of the ADA. For example, the House and Senate Committee reports state that a disability "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less

than substantial limitation."¹⁸ Both Houses indicated that individuals with impairments are considered to have an actual disability "even if the effects of the impairment are controlled by medication."¹⁹

The Tenth Circuit's decision in this case predates this Court's opinion in *Bragdon v. Abbott*, *supra*. Therefore the Tenth Circuit was not able to look to this Court for guidance in its interpretation of the ADA. In *Bragdon*, this Court concluded that non-symptomatic HIV infection is a "disability" under the ADA. In so deciding, the Court reasoned that a disease should be evaluated in its natural, untreated condition. In discussing whether medication therapy could lower the risk of perinatal transmission of the HIV infection during pregnancy and thereby substantially limit a major life activity, the Court stated:

The act addresses substantial limitations on major life activities, **not utter inabilities**. Conception and childbirth are not

18 H.R. Rep. No. 101-485, Pt. III, at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451 (House Judiciary Report); H.R. Rep. No. 101-485, Pt. II, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303-334 ("House Labor Report"); S. Rep. No. 101-116, at 23 (1989) ("Senate Report").

19 House Labor report at 52; Senate Report at 22.

impossible for an HIV victim but, without doubt are dangerous to the public health.

... In the end, the disability definition does **not turn on personal choice**. When significant limitations result from the impairment, **the definition is met even if the difficulties are not insurmountable**.

(Emphasis added.) *Bragdon v. Abbott*, *supra*, 2206.

These statements show that the Court understands the realities of having a non-curable, permanent condition regardless of any treatment which may lessen only certain consequences of the disease. If non-symptomatic HIV infection is an "impairment" under the ADA, then certainly hypertension and diabetes are qualified "impairments" under the ADA.

Finally, the EEOC has interpreted the ADA to require evaluation of an "impairment" in its untreated condition to determine whether it qualifies as a "disability under the ADA."²⁰

Treatment of a particular medical condition is not the same as cure. Treatment of diabetes with insulin and treatment of

20 EEOC Interpretive Guidance, 29 C.F.R. Part 1630, App. §§ 1630.2(h) and 1630.2(j).

hypertension with medication²¹ do not cure those diseases but, rather, only treats certain symptoms and hopefully lessens or delays the onset of complications. Frequently, treatment with medication for a particular disease becomes more ineffective over time. Frequently, a particular disease breaks through the medication or treatment requiring dramatic changes in treatment. Virtually all diseases treated with medication face the inexorable problem that over time the medication becomes less effective for a variety of different reasons.

Additionally, the treatment of diseases such as diabetes or hypertension is extremely variable. Not only are all individuals treated in an individualized manner, but the amount and effect of the treatment changes daily and sometimes hourly based on other external factors. This is particularly true for diabetes where external factors such as illness, infection, stress, diet and activity level create a constantly changing situation which requires multiple daily blood tests to monitor. With diabetes, constant vigilance is

21 The treatment of hypertension with medication to reduce blood pressure results in "severe side-effects such [as] stuttering, loss of memory, impotence, lack of sleep and irritability." Pet.App. at 16a.

necessary for the reliable, predictable treatment of diabetes with insulin.

Under the Tenth Circuit's definition, someone can have a disability one day yet, because of the variabilities of treatment, not have a disability the next day. One day an employer cannot fire a person who appears sick with a disability, but on another day can fire that same person who appears well but has the same disability.

Another problem with focusing on treatment rather than on the disease is that treatment creates new and different medical complications which cause new and different disabling problems. For both hypertension and diabetes, the individual is always between "the rock and the hard spot" concerning whether the problems of the underlying disease are better or worse than the problems of the treatment. An individual with hypertension or diabetes has a real world disability whether or not they treat.

For Vaughn Murphy, the Tenth Circuit's evaluation of his hypertension in its treated condition ignores the disabling effect and complications created by that treatment. Vaughn Murphy is "disabled" whether or not he treats his hypertension.

C. THE DEFINITION OF "IMPAIRMENT" MUST ALLOW AN INDIVIDUAL TO PURSUE TREATMENT WITHOUT SACRIFICING LEGAL RIGHTS OR REMEDIES.

As the Court pointed out in *Arnold v. United Parcel Service, Inc.*, *supra*, it is an unintended "anomaly" for an individual to have to choose between medical treatment and legal protection. This puts an individual with an "impairment" between *Scylla* and *Charybdis*, i.e. treat and risk no legal protection or don't treat but have full legal protection. This is a cruel choice for an individual living with a disability. This is contrary to the Congressional Findings and Purpose because the ADA was designed and intended to provide individuals with "legal recourse" to eliminate discrimination. 42 U.S.C. § 12101(a)(4).

The effect of looking at a disease only in its treated condition means that an individual who tries to take care of himself or herself risks losing legal protection, whereas, if he or she does not try to take care of the disease, legal protection is available. This is not the result intended by Congress. Congress intended individuals living with disabilities to use every reasonable effort to

treat and care for themselves, but still have protection against discrimination. This is why the ADA is structured to handle the effect of treatment when considering the "otherwise qualified" and "reasonable accommodation" issues.

Surely, Congress did not intend individuals to forego efforts to lessen the discomfort and problems of their disease just to qualify for legal protection. Rather, Congress intended individuals with disabilities to have "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8). It is the purpose of the ADA to encourage individuals in every way possible to live well with their disability rather than to discourage or penalize persons for such efforts.

The unintended consequences of the restrictive definition of "impairment" by the Tenth Circuit in this case forces a no-win choice for millions of Americans. The ADA was not created to protect the rights and provide remedies for individuals who are not able to work because they do **not** treat their disability. Affirming the Tenth Circuit will create that result. Effort to treat should be rewarded with and not denied ADA protection.

No individual living with a disability should

ever be discouraged from doing everything possible to live well with that disability. No one should be caught in the "Catch 22" of treating their disability only to lose ADA protection.

CONCLUSION

Under the Tenth Circuit's approach to the ADA an individual with a disability is a double victim - a victim of his disease and a victim of the ADA because he tried to treat his disease. Only if this Court looks at a disease in its natural, untreated condition can an individual with a disease receive the intended protection of the ADA.

This Court should reverse and remand this case.

Respectfully submitted,

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